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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71-1442

ROLAND V. COLGROVE,

Petitioner,

against

HONORABLE JAMES F. BATTIN,
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF MONTANA,
BILLINGS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals is not yet officially reported. The court below refused to grant petitioner a writ of mandamus to force the United States District Court for the District of Montana to try this case before a jury of twelve persons. A copy of said opinion is found in the Appendix, page 23.

JURISDICTION

The order and decision of the United States Court of Appeals was entered on March 6, 1972. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * *."

Amendment VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

STATUTES AND RULES INVOLVED

28 U.S.C., Section 2071, provides:

"The Supreme Court and all courts established by

rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

28 U.S.C., Section 2072, provides:

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

28 U.S.C., Section 2073, provided:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and

procedure in admiralty and maritime cases in the district courts of the United States and all courts exercising admiralty jurisdiction in the Territories and Possessions of the United States.

"Such rules shall not abridge or modify any substantive right.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court." Repealed. Pub.L. 89-773, Section 2, Nov. 6, 1966, 80 Stat. 1323.

Rule 1, Federal Rules of Civil Procedure, provides:

"These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 48, Federal Rules of Civil Procedure, provides:

"The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict of a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Rule 83, Federal Rules of Civil Procedure, provides:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. * * * In all cases not provided for by rules, the district courts may regulate their practice in any manner not inconsistent with these rules."

Rule 13(d)1 of the Revised Rules of Procedure of the United States District Court for the District of Montana provides:

> "A jury for the trial of civil cases shall consist of six persons * * *." (Amendment effective September 1, 1971)

QUESTIONS PRESENTED

(1) Did the court below err in holding that the Seventh Amendment to the Constitution of the United States does not require that a United States District Court try a civil case before a jury of twelve persons unless the parties stipulated otherwise?

(2) Did the court below err in holding that Rule 48 and Rule 83 of the Federal Rules of Civil Procedure do not require the trying of cases before a jury of twelve persons unless the parties stipulate otherwise?

STATEMENT OF THE CASE

The suit in the United States District Court for the District of Montana out of which the petition for writ of mandamus grew was an action for libel and jurisdiction of the case is invoked under Title 28, U.S.C., Rule 1414(b). There is diversity of citizenship between the parties hereto and the amount in controversy exceeds $10,000.00.

The United States District Court for the District of Montana passed Rule 13(d)1 of the Revised Rules of Procedure of said court, and the same became effective on September 1, 1971. (A. 28) Pursuant to Rule 13(d)1, the United States District Court set the trial of Civil No. 783 for September 27, 1971, to a jury consisting of six persons.

The plaintiff moved the court to try Civil No. 783 to a trial jury of twelve persons. The court denied this motion but rescheduled the trial of the case for October 12, 1971. (A. 1) Thereafter, the court vacated that setting and ordered that the resetting be subject to the direction of the Circuit Court of Appeals.

The petitioner, on or about October 4, 1971, petitioned the Circuit Court of Appeals for the Ninth Circuit for a writ of mandamus. (A. 2) Thereafter, and on March 6, 1972, the Circuit Court of Appeals handed down its order and opinion denying the petition for writ of mandamus. (A. 23)

On or about May 4, 1972, petitioner filed his petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this Court. On October 10, 1972, the petition for a writ of certiorari was granted.

SUMMARY OF ARGUMENT

This case presents the issue of whether a federal district court has the right or power to pass and enforce, against the desire of the parties, a ruling that a civil case be tried before a jury of six persons.

I.

We submit that by the use of the words "common law" twice in the Seventh Amendment, the proper interpretation of

of the amendment requires that this Court find that a civil case must be tried before a common law jury as it was composed at the time of the passing of the Seventh Amendment, which jury consisted of twelve persons unless the parties stipulated otherwise.

II.

Rule 83 of the Federal Rules of Civil Procedure provides that a federal district court may make rules, but they must not be inconsistent with the Federal Rules of Civil Procedure.

Rule 48 of the Federal Rules of Civil Procedure provides that the parties can stipulate to a jury of less than twelve members.

To allow a federal district court in a civil case to require that the case be tried before a jury of less than twelve persons, i.e. six persons, would be inconsistent with Rule 48 of the Federal Rules of Civil Procedure and beyond the power and authority of a district court and would violate one of the purposes of the Federal Rules of Civil Procedure, which is to make the rules uniform throughout the federal court system. See 2 Moore's Federal Practice (2d), Section 1.02; 7 Moore's Federal Practice (2d), Section 83.03.

ARGUMENT

I.

THE SEVENTH AMENDMENT, UNLESS THE PARTIES STIPULATE OTHERWISE, REQUIRES THAT A JURY IN FEDERAL CIVIL CASES CONSIST OF TWELVE

In *Capitol Traction Co. v. Hof*, 174 U.S. 1, 43 L. Ed. 873, 19 S.Ct. 80 (1970), this Court held that the Seventh Amendment guarantees a right to a jury of twelve persons.

This rule is not changed by this Court's decision in *Williams*

v. Florida, 399 U.S. 78, 26 L.Ed.(2d) 446, 90 S.Ct. 1893. By Note 30, 399 U.S. 92, the Court reserved for later decision whether or not the Seventh Amendment requires a jury of twelve members, in the following language:

> "* * * we do not decide whether, for example, additional references to the common law that occur in the Seventh Amendment might support a different interpretation."

At the time of the writing and adoption of the Sixth and Seventh Amendments, a common law jury consisted of twelve persons. *Williams v. Florida*, supra; *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854. For other authorities, see Note 19 found in the majority opinion in *Williams v. Florida*, supra.

We believe the writers of the Sixth and Seventh Amendments, at the time they were writing the same, must have felt there was a definite distinction between the Sixth and Seventh Amendments. Otherwise they would have used the same language in each. The additional reference to the common law leads us to believe that the founding fathers meant the people to have a right to a common law jury of twelve persons.

II.

RULES 1, 48 AND 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE THAT A CIVIL CASE BE TRIED BEFORE A JURY OF TWELVE UNLESS THE PARTIES STIPULATE OTHERWISE

In this case, petitioner not only did not stipulate to try the case before a jury of less than twelve, but moved the court for the case to be tried before a jury of twelve. The court refused and the petitioner filed his petition for writ of mandamus to force the United States District Court to try this case before a jury of twelve.

Rule 83 of the Federal Rules of Civil Procedure provides in part as follows:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. * * *"

Rule 83 has been held many times to be a limitation on the power of the district court. See *Bogotay v. Montour R. Co.*, 177 F. Supp. 269 (D.C. Pa. 1959); *Cedolia v. C. S. Hill Saw Mills*, 41 F.R.D. 524 (D.C. N.C. 1967); *Dredge Corp. v. Penny*, 338 F.2d 456 (9th Cir. 1964); *First National Bank of Henrietta v. Small Business Administration*, 429 F.2d 280 (5th Cir. 1970).

The district courts have no power to rewrite the Federal Rules of Civil Procedure by passing a local rule. The courts have no right to rewrite the Federal Rules of Civil Procedure by judicial interpretation. This was recognized by this Court in *Harris v. Nelson*, 394 U.S. 286, 298, 22 L.Ed(2d) 281, 89 S.Ct. 1082, where the Court said:

> "We have no power to rewrite the rules by judicial interpretation."

Rule 48 of the Federal Rules of Civil Procedure provides that parties may stipulate to a jury of less than twelve.

According to the clear wording of Rule 48, only the parties may stipulate to a jury of less than twelve members; and, absent this stipulation, the jury must consist of twelve members. There is no ambiguity in Rule 48, and it was in full force and effect when the disputed local rule was adopted. Under Rule 1 of the Federal Rules of Civil Procedure, Rule 48 is binding on the United States district courts.

In *Fox v. United States*, 417 F.2d 84 (5th Cir. 1969), at

page 89, the Court says:

> "Unless otherwise stipulated, the verdict in a civil case must be the unanimous verdict of twelve jurors. Fed. R. Civ. P. 48."

To allow a federal district court without stipulation to designate a lesser number than twelve jury members in a civil case would grant the local courts the right to make a major change in the Rules of Civil Procedure, which, under 28 U.S.C., Section 2072, is the sole province of the United States Supreme Court with the concurrence of Congress.

Part of Rule 28, U.S.C., Section 2072, provides:

> "Such rules shall not take effect until they have been reported to Congress by the Chief Justice * * * and until the expiration of ninety days after they have been thus reported."

Prior to its repeal on November 6, 1966, 28 U.S.C. 2072, dealing with admiralty rules for the district court, had the same provision as the part of 28 U.S.C. 2072 quoted above.

We submit, in reasoning, *Miner v. Atlass*, 363 U.S. 641, 4 L.Ed.(2d) 1462, 80 S.Ct. 1300, is in point. The Court, in an admiralty case, held that a district court could not, by a local rule, allow a deposition for discovery purposes under Rule 26 of the Federal Rules of Civil Procedure. The Court, in that opinion, at page 363, U.S. 650, said:

> "The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court, see 28 U.S.C., Sec. 331 (advisory function of Judicial Conference), 28 U.S.C., Sec. 2073 (Prior report of proposed rule to Congress), designed to insure that basic procedural innovations

> shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords. Having already concluded that the discovery-deposition procedure is not authorized by the General Admiralty Rules themselves, we should hesitate to construe General Rule 44 as permitting a change so basic as this to be effectuated through the local rule-making power, especially when that course was never reported to Congress as would now be required under 28 U.S.C., Sec. 2073."

One of the major purposes of the Federal Rules of Civil Procedure is to achieve uniformity throughout the federal system; this purpose is defeated if each local district court would be allowed to make its own rule regarding the size of juries. It would encourage forum shopping, create inconvenience for litigants and cause disproportionate case loads in some districts. *Hanna v. Plumer*, 380 U.S. 460, 14 L.ed(2d) 8, 85 S.Ct. 1136; 1B Moore's Federal Practice (2d), Section 0.512.

CONCLUSION

A civil jury in the federal courts has always been understood to be a jury of twelve persons. We believe that the founding fathers, in writing the Seventh Amendment, meant for the people to have a right to a common law jury of twelve.

Even if this Court should decide that the Seventh Amendment does not require a jury of twelve, the local district court does not have the right or power to violate the clear meaning of Rule 48 of the Federal Rules of Civil Procedure.

The plaintiff submits that the Court should now order the United States District Court for the District of Montana to try the

case of Roland V. Colgrove v. State Farm Mutual Automobile Insurance Company before a jury of twelve persons.

LLOYD J. SKEDD
1225 - 11th Avenue
Helena, Montana 59601

/s/ Lloyd J. Skedd

Attorney for Petitioner

CERTIFICATE OF SERVICE

I, LLOYD J. SKEDD, attorney for the Petitioner herein, hereby certify that on this 21st day of November, 1972, I served the foregoing Brief for the Petitioner by depositing full, true and correct copies (3 copies to each) thereof, in the United States mail, Airmail, prepaid, addressed as follows:

Honorable James F. Battin
U. S. District Judge for Montana
Federal Building
Billings, Montana 59101

Mr. Cale Crowley
Crowley, Kilbourne, Haughey,
Hanson & Gallagher
Attorneys at Law
Electric Building, P.O. Box 2529
Billings, Montana 59101

Mr. Dale F. Galles
Harwood, Galles, Gunderson & Beiswanger
Attorneys at Law
Electric Building
Billings, Montana 59101
(attorneys for respondent)

Mr. L. Morris Ormseth
Jardine, Stephenson, Blewett & Weaver
Attorneys at Law
700 First National Bank Building
Great Falls, Montana 59403
(attorneys for State Farm
Automobile Insurance Company)

Solicitor General
Department of Justice
Washington, D. C. 20530

/s/ Lloyd J. Skedd